Supreme Court, U.S.
FILED

931158 JAN 18 1994

OFFICE OF THE CLERK

No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

EMMETT R. DAVIS, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

STEPHEN L. BLACK
GRAYDON, HEAD & RITCHEY
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202

Counsel for Petitioner

Of Counsel:

ANTHONY F. RECINE, ESQ.
1740 Broadway
New York, New York 10019
(212) 70[illegible]-2200

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

178 pp

QUESTIONS PRESENTED

1. Whether under RICO §1962(c) a corporation can be both the person and the enterprise with which it is associated, so as to be held liable for the acts of its own employees and agents in the conduct of the corporation's business?

2. Whether a federal court in diversity jurisdiction should construe a state-created fee-shifting statute as it believes the highest state court would rule in the present case?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were:

Plaintiffs-Appellees	Defendant-Appellants (and Cross-Appellees)
Emmett R. Davis (Cross-Appellant)	The Mutual Life Insurance Company Company of New York[1]
Margaret A. Davis	Trans World Assurance Company[2]
Donald R. Griffey	
Sue A. Griffey	
Joseph F. Feldkamp, Administrator of the Estate of Herbert Adler, deceased	
Gertrude Adler	
Robert Storms	
Roslyn Storms	
James R. Abney	
George Lamb	
Janie D. Lamb	
Alfred R. Clark	
Madgalene Clark	
Shirley Johnson	
Samuel R. Johnson	
Wanda L. Johnson	
Byrd Lenard	

---

[1]The Mutual Life Insurance Company of New York has no parent corporation nor any subsidiaries not wholly owned.

[2]To the best of petitioner's knowledge and information, Trans World Assurance Company has no parent corporation nor any subsidiaries not wholly owned.

Parties to the Proceeding Continued

Charles Lenard
Deloris J. Lenard
Henrietta Lenard
Robert Lenard, Jr.
Charles Page
Wanda Page
Sheila A. Poast
Thomas R. Poast
Margaret Smith
Edward L. Smith
Lola M. Terrell
Wilbur Terrell, Jr.

The parties to the proceeding in the United States District Court for the Southern District of Ohio included all the above and Donald S. Fletcher and Fletcher Insurance Associates as defendants.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING . . . . . ii, iii

TABLE OF CONTENTS . . . . . iv-vi

TABLE OF AUTHORITIES . . . . . vi-viii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. There is a split among the Courts of Appeals applying RICO §1962(c) as to whether a corporation as the "person" can associate with an enterprise consisting of its own employees, agents, subsidiaries or divisions 6

A. To be liable under RICO §1962(c), the corporate "person" must be separate and distinct from the "enterprise" with which it is associated 6

B. The doctrine of respondeat superior should not apply to corporate employers of persons liable under RICO §1962(c) 13

C. If Fletcher Insurance Associates was a separate and distinct enterprise, MONY did not operate or participate in the management of that enterprise so as to be liable under RICO §1962(c) 14

Table of Contents Continued

Page

D. Conclusion: This Court should resolve the split between the Courts of Appeals as to when a corporate person is separate and distinct from the enterprise for RICO purposes 15

II. A federal court in diversity jurisdiction should construe a state-created fee-shifting statute as it believes the highest state court would construe it in the present case 16

CONCLUSION 20

APPENDIX A-1

Statutes

18 U.S.C. §1961 . . . . . A-2
18 U.S.C. §1962 . . . . . A-5
18 U.S.C. §1964 . . . . . A-6
Ohio Revised Code §1345.09 . . . . . A-7

Lower Court Proceedings

Opinion of the Court of Appeals, filed September 21, 1993 . . . . . A-9

Order of the Court of Appeals denying petition for rehearing, filed October 19, 1993 . . . . . A-52

Judgment of the District Court, entered March 8, 1990 . . . . . A-53

Table of Contents Continued

Page

Order of the District Court denying all motions for judgment notwithstanding the verdict or for new trial, filed May 18, 1990 . . . . . A-83

Order of the District Court awarding attorneys' fees, filed August 10, 1990 . . . . . A-99

Order of the District Court correcting order awarding attorneys' fees, filed August 22, 1990 A-115

State Court Decisions

Bittner v. Tri-County Toyota, Inc., 58 Ohio St.3d 143 (1991) A-117

Freeman v. Crown City Mining, Inc., No. 92 CA 41, 1993 Ohio App. Lexis 5062 (4th App.Dist) . A-125

Hall v. Lacheta, No. 92APO20013, 1992 Ohio App. Lexis 5945 (5th App.Dist.) A-142

TABLE OF AUTHORITIES

Page

Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987) . . . 9, 10

B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628, 633-34 (3d Cir. 1984) 9

Bittner v. Tri-County Toyota, Inc., 58 Ohio St.3d 143, 567 N.E.2d 464, 467 (1991) 5, 17 18

Table of Authorities Continued

Page

Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1153-54 (9th Cir. 1992) 13

Brittingham v. Mobil Corp., 943 F.2d 297, 301 (3d Cir. 1991) 8-10 . . . . . 9, 11

City of Burlington v. Dague, 112 S.Ct. 2638 (1992) . . 5, 16, 18

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) . . 17

Freeman v. Crown City Mining, Inc., 1993 Ohio App. Lexis 5062 at *20-*23 (4th Dist.Ct.App. 1993) 18, 19

Hall v. Lacheta, 1992 Ohio App. Lexis 5945 at *6 (5th Dist.Ct.App. 1992) 18

Haroco v. American National Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985) 9

Hensley v. Eckerhart, 461 U.S. 424 (1983) 17

Hofstetter v. Fletcher, 905 F.2d 897 (6th Cir. 1988) . . 8

Meredith v. Winter Haven, 320 U.S. 228, 238 (1943) . 17

Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21, 23-24 (1st Cir. 1988) 9, 10, 12

Table of Authorities Continued

Page

Reves v. Ernst & Young, 113 S.Ct. 1163, 1171-72 (1993). 14, 15, 16

Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986) 13

U.S. v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) 9

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941). 17

Yellow Bus Lines Inc. v. Local Union 639, 839 F.2d 782 (D.C.Cir. 1988), rev'd on other grounds, 492 U.S. 914 (1989) 10, 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

No. _____

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK

Petitioner

TRANS WORLD ASSURANCE COMPANY,
DONALD S. FLETCHER, and
FLETCHER INSURANCE ASSOCIATES

v.

EMMETT R. DAVIS, et al., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 6 F.3d 367 and reported unofficially at 1993 U.S.App. Lexis 24254. There are no reported opinions of the District Court.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 21, 1993. On October 19, 1993, the Court of Appeals entered an order denying a motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES

The Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 to 1968, provides in §1962(c):[3]

* * *

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * *

18 U.S.C. §1961 provides the following pertinent definitions:

* * *

> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or

---

[3]For the full text of this section, please see the Appendix, p. A-5.

group of individuals associated in fact although not a legal entity;

* * *

Ohio Rev. Code §1345.09(F) states as follows:

* * *

The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

STATEMENT OF THE CASE

This case arises from life insurance sales to the respondents through the techniques of Mr. Donald S. Fletcher and his associates who collectively comprised Fletcher Insurance Associates, an unincorporated group. The primary focus of Mr. Fletcher was to instruct individuals (including respondents) on methods to avoid personal income tax liability. According to Mr. Fletcher, if an individual formed a home-based business (e.g., Amway), he could reduce and even eliminate his federal income tax liability by writing off nearly all household expenses associated with the business as deductible business expenses. Mr. Fletcher presented this theory to his potential clients at tax-oriented seminars during which he suggested that he would assist the clients in finding tax return preparation services and tax audit services to carry out his tax plan. His clients were or became involved in home-based businesses. Mr.

Fletcher and his associates earned commissions through life insurance policies purchased by the clients with part of the tax savings. The tax savings also were used to purchase the Amway inventory.

Mr. Fletcher and his associates initially represented New York Life Insurance Company and sold its policies. In 1980, he and his associates became affiliated with the Mutual Life Insurance Company of New York ("MONY," the petitioner herein), he as an employee and an agent and his associates as agents. In late 1983, he once again changed insurance company affiliation, this time favoring Trans World Assurance Company ("TWA") insurance products.

From 1980 to 1983, twenty-five of the plaintiffs[4] were insured with MONY. During this period, the respondents knowingly filed exaggerated and misleading tax returns with the Internal Revenue Service. The tax returns of the plaintiffs were audited and despite Mr. Fletcher's assurances to his clients that the IRS would not prevail, the deductions for home-based businesses were largely disallowed and additional taxes, penalties and interest were assessed.

The twenty-nine plaintiffs in the present action were all recipients of Mr. Fletcher's improper tax advice. They filed this action for damages alleging Ohio common law and statutory claims including violation of Ohio's Consumer Sales Practices Act ("CSPA"), of which the breach entitled them to recover their reasonable attorney fees. They also included claims based on RICO §1962(c) and (d). Jurisdiction was premised on 28 U.S.C. §§1331, 1332 and 1337 and 18 U.S.C. §§1964(c) and 1965 as well as the doctrine of pendent jurisdiction as to the state law claims. Named as defendants were Mr. Fletcher, Fletcher Insurance Associates,

---

[4]The remaining four plaintiffs bought life insurance policies after 1983 from co-defendant Trans World Assurance Company.

MONY and TWA. After a twenty-day trial, the jury found all defendants liable under state law claims for common law fraud, breach of fiduciary duty, breach of contract and violations of Ohio's CSPA. With respect to the RICO claims, it found that Fletcher and MONY were liable persons under §1962(c), but not TWA. It further found no violation of §1962(d) (conspiracy to violate §1962(c)) by any defendant, but that Mr. Fletcher and Fletcher Insurance Associates had participated in a common law conspiracy while MONY and TWA had not.

Based on the jury's findings and the Court's allocation of damages, judgment was entered in plaintiffs' favor against MONY in the amount of $2,280,034.66, treble the compensatory damages found by the jury, as RICO provides. Various post-judgment motions were denied. The District Court further awarded the plaintiffs $586,055.74 in attorneys fees and expenses against MONY, under the authority of both RICO and the Ohio CSPA.

MONY and TWA appealed to the Sixth Circuit Court of Appeals under 28 U.S.C. §1291, and the named plaintiff cross-appealed. The Court of Appeals affirmed the liability of MONY on the state law and RICO claims, but found the evidence insufficient to support the jury's verdict against TWA and reversed as to that defendant. Following the dictate of *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), the Court held that the District Court's use of an enhancement factor in the award of attorney fees was improper under RICO, but affirmed the use of the same multiplier to calculate a reasonable attorney fee under the Ohio Consumer Sales Practices Act, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 567 N.E.2d 464, 467 (1991). It declined to give the cross-appealing plaintiff further relief via his cross-appeal directed to issues of apportionment of damages or a new trial on punitive damages.

The Court of Appeals' decision was entered September 21, 1993. The plaintiffs filed a petition for rehearing on October 5, 1993, which was denied by order entered October 19, 1993.

REASONS FOR GRANTING THE WRIT

I. There is a split among the Courts of Appeals applying RICO §1962(c) as to whether a corporation as the "person" can associate with an enterprise consisting of its own employees, agents, subsidiaries or divisions.

A. To be liable under RICO §1962(c), the corporate "person" must be separate and distinct from the "enterprise" with which it is associated.

Section 1962(c) of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

It is undisputed in the present case that the plaintiffs proceeded against MONY under RICO §1962(c) naming MONY as the corporate "person" and Fletcher Insurance Associates as the "enterprise"[5] in whose affairs MONY allegedly participated indirectly in conducting a pattern of racketeering activity. The fallacy of this theory is that by becoming a "captive" MONY insurance group, Fletcher Insurance Associates became a part of the MONY corporate entity for RICO purposes, and thus there was no separate or distinct "enterprise."

---

[5]Plaintiffs' attorneys argued throughout trial that Fletcher Insurance Associates was the RICO "enterprise" and Fletcher Insurance Associates was eliminated as a party on the jury verdict form in the RICO portion of the form.

The evidence presented at trial showed irrefutably that Mr. Fletcher and his colleagues all became exclusively MONY agents at the time they left New York Life. In April of 1980, New York Life terminated its relationship with Mr. Fletcher and his fellow agents pursuant to their written contracts. Mr. Fletcher and his partner Mr. Neil McKelvie then approached MONY to inquire if they could be appointed agents to sell life insurance. MONY launched an investigation and review of Fletcher Insurance Associates which lead to the conclusion that, although their *modus operandi* for New York Life might be characterized a "fast-track hustle," given proper supervision and controls they might mend "past errant ways" and "abandon marketing philosophies inconsistent with the fundamental principles by which MONY was both founded and is now guided."[6] Mr. Fletcher and his associates were then hired and trained as MONY agents, and given contracts allowing them to sell insurance only for MONY. In short, MONY took a calculated risk that the Fletcher group could be absorbed into MONY and cleansed of the unacceptable aspects of its marketing techniques.

As the jury determined below, MONY was held liable for Mr. Fletcher's continuing conduct. The jury awarded plaintiffs compensatory damages (i.e., additional taxes, penalties and interest assessed against plaintiffs by the Internal Revenue Service) for the state law claims of breach of contract, fraud, and breach of Ohio's CSPA. In addition, MONY was required to disgorge all profits by the jury award of $28,139.96 in the aggregate as punitive damages, which represented all premiums received from these plaintiffs. The jury was further instructed as to the RICO claim:

> If you should find that there is one enterprise, then all defendants associated with that enterprise are liable to the plaintiffs, if the remaining elements of this RICO claim are established.

---

[6]Plaintiff's Exhibit 101, pp. 4-5.

* * *

> ...for purposes of the RICO statute, the "person" and the "enterprise" cannot be the same.[7]

However, no evidence could support the jury's finding of RICO §1962(c) liability. Since MONY had assimilated the Fletcher enterprise into its corporate structure, under RICO it became both the "enterprise" and the "person."

The District Court and Court of Appeals failed to recognize that Fletcher Insurance Associates could not pass the distinctness test. In overruling MONY's motion for judgment NOV, the District Court simplistically concluded that, because the jury had properly been instructed that the same individual or corporation cannot be both the "enterprise" and "person" under RICO, the jury's verdict must stand, largely ignoring the evidentiary issue.[8] On appeal, the Court of Appeals cited a number of facts[9] evidencing the independence of the Fletcher organization. Its ultimate conclusion on this point was that:

* * *

> Nothing in the facts before us, including Donald Fletcher's agreement to sell only MONY life insurance from June 1980 through November 1983, persuades us that the independence of FIA diminished to such an

---

[7]Jury Instructions, pp. 31, 32.

[8]Order of May 18, 1990, p. A-88 of Appendix.

[9]The Court even cited its own opinion in an earlier case involving a RICO claim against Fletcher Insurance Associates, from which New York Life had been dropped as a party. Slip Opinion at A-24, citing *Hofstetter v. Fletcher*, 905 F.2d 897, 903 (6th Cir. 1988).

> extent that the jury could reasonably conclude only that FIA was, during that interval, indistinguishable from MONY.[10]

* * *

By framing the issue in this fashion, the Court of Appeals applied the wrong test. The issue as defined by caselaw is not whether the enterprise is "independent" from the corporate "person," but whether the enterprise is sufficiently separate and distinct. The circuit courts of appeal are split on how one judges whether the enterprise is distinct from the person. To some courts of appeals, if the "person" is organized as a separate legal entity (such as a parent or subsidiary corporation), then it is sufficiently distinct to be liable under RICO §1962(c). *Haroco v. American National Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *U.S. v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). In other circuits, a parent corporation or wholly-owned subsidiary or corporate division is not sufficiently distinct to incur liability under RICO §1962(c). *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991); *B.F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628, 633-34 (3d Cir. 1984). *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987); *Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988). As noted by the Third Circuit in the *Brittingham* case:

> We agree with the district court that the alleged enterprise is not distinct from the defendants for purposes of the *Enright* rule. We believe a §1962(c) enterprise must be more than an association of individuals or entities conducting the normal

---

[10]Slip Opinion at A-24-25. Remarkably, at one point in its decision, the Court opines that liability could be predicated upon "some other association-in-fact having taken place largely through the acts of Fletcher." No evidence was presented at trial as to the existence of any other enterprise.

affairs of a defendant corporation. A corporation must always act through its employees and agents, and any corporate act will be accomplished through an "association" of these individuals or entities. Consequently, the *Enright* rule would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf. The distinctiveness requirement ensures that RICO sanctions are directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted. Therefore, we must examine the enterprise allegation to determine whether it is no more than an association of individuals or entities acting on behalf of a defendant corporation. Our decision is in accord with numerous courts that have rejected attempts to circumvent the distinctiveness requirement by alleging enterprises that are merely combinations of individuals or entitles affiliated with a defendant corporation.[2] [Emphasis added.]

---

[2] *See, e.g., Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132. 139-41 (D.C.Cir. 1989) (enterprise alleged as association of defendant union with its business agent and trustee), *adopted on reh'g*, 913 F.2d 948, 951 (D.C.Cir. 1990) (en banc), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991); *Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) (association of officers or employees conducting business of corporation is not distinct from corporation); *Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988) (enterprise alleged as association of defendant insurance company, its subsidiaries, and employees); *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987) (parent of defendant bank), *overruled on other grounds, Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-42 (4th Cir. 1990) (in banc); *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (association of defendant bank, its holding company, and employees), *cert. denied*, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1290-92 (4th Cir. 1982) (unincorporated division of defendant corporation), *overruled on other grounds, Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-42 (4th Cir. 1990) (in banc); *Moffatt Enters., Inc. v. Borden, Inc.*, 763 F.Supp. 143, 149 (W.D.Pa. 1990) (association of defendant

company, its employees, and advertising agency); *Newfield v. Shearson Lehman Bros.*, 699 F.Supp. 1124, 1127 (E.D.Pa. 1988) (association of defendant company and two employees); *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1462 (W.D.Mo. 1987) (association of defendant corporation and three employees); *Gilbert v. Prudential-Bache Sec., Inc.*, 643 F.Supp. 107, 109 (E.D.Pa. 1986) (association of defendant brokerage firm and its branches); *Tarasi v. Dravo Corp.*, 613 F.Supp. 1235, 1236-67 (W.D.Pa. 1985) (association of defendant corporation and its agent.

Brittingham v. Mobil Corp., 943 F.2d at 301. The *Brittingham* court held that a corporate defendant and its subsidiary and their advertising agencies could not be held liable under RICO §1962(c) for engaging in allegedly fraudulent activities in the conduct of their business operations.

By taking the position that Fletcher Insurance Associates was a separate and distinct organization, notwithstanding the fact that each of the members of that agency had signed an agreement to be exclusively a MONY agent, the Sixth Circuit adopted the minority view that any evidence of an independent legal existence is a sufficient basis to find that an affiliated group is separate and distinct enough to trigger §1962(c) liability for its parent corporation. Such a rule is excessively formalistic in approach and extends RICO liability well beyond the scope of the statute. The better rule is that the separate and distinct corporation must have a distinctive role in the operation in order to be liable as a "person" under RICO §1962(c). As stated by the Third Circuit in the *Brittingham* case:

> Without allegations or evidence that the defendant corporation had a role in the racketeering conduct that was distinct from the undertakings of those acting on its behalf, the distinctiveness requirement is not satisfied. [Emphasis supplied.]

943 F.2d at 302. The heart of petitioner's argument in the present case is that there was no evidence by which the jury could find that MONY had any role in the life insurance sales that was different from the role of Mr. Fletcher and the other MONY agents.

The District of Columbia Circuit took a similar position in *Yellow Bus Lines Inc. v. Local Union 639*, 839 F.2d 782 (D.C.Cir. 1988), *rev'd on other grounds*, 492 U.S. 914 (1989), where a labor union stood accused of RICO §1962(c) violations during a recognition strike. Named as defendants were the local union and its business agent. The trial court dismissed the RICO claims, holding that the local union could not be both the "person" and the "enterprise" in the case. The Court of Appeals affirmed holding that the members of the enterprise association may not simply be subdivisions, agents or members of the defendant organization:

* * *

> In short, an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself.

839 F.2d at 791. In the present case, MONY has done just that, and no more. *See also Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 28 (1st Cir. 1988) (holding life insurance company and its subsidiaries, officers and employees cannot be both "person" and "enterprise" under RICO §1962(c)).

In the *Enright Refining Co.* case, the Third Circuit noted:

> One of the Congressional purposes in enacting RICO was to prevent the takeover of legitimate businesses by criminals and corrupt organizations. It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances.

751 F.2d at 633-34 (citations omitted). The overwhelming irony of the Sixth Circuit Court of Appeals' decision in the present case is that it does just that -- it uses RICO to punish a legitimate business (MONY) for the activities of the infiltrating criminal. To cling to the fallacy that Fletcher Insurance Associates is the "legitimate" and

"innocent" victim makes a mockery of the well-reasoned rule of law applying the RICO statute.

B. The doctrine of respondeat superior should not apply to corporate employers of persons liable under RICO §1962(c).

Beginning perhaps with the case of *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986), a body of law has emerged in the Courts of Appeal to the effect that the doctrine of respondeat superior should not be applied to hold the corporate employers of RICO "persons" liable under §1962(c) where the enterprise and the person are not distinct. *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1153-54 (9th Cir. 1992) and cases cited therein. In the present case, the Sixth Circuit declined to follow this body of law, holding that it did not apply because MONY was distinct from the RICO enterprise (FIA) and because MONY benefited from the conduct of its employee Mr. Fletcher.[11] After reviewing the case law in this area, the Court of Appeals wrote:

> The rule to be drawn from these cases is that plaintiffs may not use RICO to impose liability vicariously on corporate "enterprises," because to do so would violate the distinctness requirement. No such prohibition, however, prevents the imposition of liability vicariously on corporate "persons" on account of the acts of their agents, particularly where the corporation benefitted by those acts. Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

---

[11]Slip Opinion at A-29.

Slip Opinion at A-29. Petitioner respectfully urges that the Court of Appeals was incorrect in its analysis. The conduct of a corporation's business by its employees nearly always benefits the corporation. In enacting RICO §1962(c), Congress did not intend to impose vicarious liability on corporate employers, whose liability is amply established by §1962(a) and (b) of the act. Congress intended merely to provide a cause of action against the operators or managers of organizations infiltrated by organized crime. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1171-72 (1993). It was error for the Sixth Circuit to rule in the present case that MONY is liable under RICO §1962(c) as the corporate employer of Donald Fletcher solely because MONY received some benefits from his activities. Under the *Reves* case, actual operation or management of the illegal enterprise had to be found.

C. If Fletcher Insurance Associates was a separate and distinct enterprise, MONY did not operate or participate in the management of that enterprise so as to be liable under RICO §1962(c).

Finally, petitioner submits that if the Sixth Circuit Court of Appeals was correct in holding that Fletcher Insurance Associates was a sufficiently separate and distinct enterprise, then it erred in its application of the "operation or management" test set forth in *Reves v. Ernest & Young*, 113 S.Ct. 1163 (1993). Under that test, to conduct or participate, directly or indirectly in the conduct of the enterprise's affairs, one must participate in the operation or management of the enterprise itself. *Id.*, 113 S.Ct. at 1173.

The evidence at trial of this action showed that Fletcher Insurance Associates was an insurance group run by Donald Fletcher at the time it was selling MONY life insurance policies through MONY agents such as Evelyn Johnson. Although Mr. Fletcher and Mrs. Johnson were both agents of MONY, the evidence was undisputed that MONY instructed them not to prepare tax returns or to link tax preparation assistance with the purchase of life insurance. Mr. Fletcher operated and managed Fletcher Insurance Associates as an enterprise which facilitated the sale of life insurance policies.

Mr. Fletcher's and the agents' activities in rendering tax advice were clearly outside the scope of their authority as MONY agents. MONY should not have been held responsible for the conduct of this enterprise, where the acts were illegal and by definition not within the scope of its agents' authority. To hold otherwise would be to impute *criminal* acts upon a corporate employer.

The only other evidence found by the Court of Appeals to support the jury's verdict of direct liability under RICO §1962(c) was MONY's continuing to allow Mr. Fletcher and his colleagues to carry on with their sales techniques. The Court of Appeals felt that this passive inaction, with knowledge that wrong was being done, was sufficient to meet the *Reves* standard.[12] Such a finding, however, runs contrary to what this Court evidently had in mind in articulating the *Reves* standard, which requires active direction and management of the illegal enterprise as a prerequisite for RICO liability. The Sixth Circuit erred in failing to apply the *Reves* standard.

D. Conclusion: This Court should resolve the split between the Courts of Appeals as to when a corporate person is separate and distinct from the enterprise for RICO purposes.

The extent to which a corporation is exposed to a RICO treble-damage claim is an issue of paramount concern to the business community of this nation, and particularly to the life insurance industry which operates in many cases through a network of agents. The Court of Appeals erred in holding MONY liable under RICO §1962(c) for the conduct of its own employees and agents. The decision below adopts the minority rule amongst the circuit courts that under RICO §1962(c) a corporation is separate and distinct from an enterprise by reason of its independent legal existence and therefore may be held liable for the conduct of its agents and

---

[12]Slip Opinion at A-30.

affiliates. The Court of Appeals failed properly to apply the operation or management test of *Reves v. Ernst & Young, supra.* The Supreme Court should take jurisdiction of this appeal to correct this error and to settle the law amongst the courts of appeals as to when a corporate "person" is separate and distinct from the "enterprise" under RICO §1962(c).

II. A federal court in diversity jurisdiction should construe a state-created fee-shifting statute as it believes the highest state court would construe it in the present case.

In the present case, the District Court awarded attorneys fees to plaintiffs under both RICO (18 U.S.C. §1964(c)) and CSPA (Ohio Rev. Code §1345.09(F)) computing a lodestar amount of $531,569.84.[13] It then multiplied this figure by an enhancement factor of 1.75 due to (1) the impact of the size of the case on plaintiff's attorneys' small firm and (2) the contingent fee nature of the case. The total fee award of $930,247.22 was then apportioned between the defendants.[14] In making the award, the District Court did not address the issue of whether use of the enhancement multiplier was proper under state law (CSPA).

On appeal, the Sixth Circuit held that use of the enhancement multiplier for calculating the award under RICO was unreasonable, following *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992). It reasoned that both the contingency nature of the case and the effect of the case on a small firm were factors already reflected in the

---

[13]To arrive at this amount, the District Court took the lodestar figure sought by plaintiffs and reduced it for (1) time spent on a related case; (2) time on matters not related to the present litigation; (3) conflicting time records and inadequate documentation; (4) duplication; and (5) an agreed reduction. Order of August 10, 1990, pp. A-101-105 of Appendix.

[14]Order of August 10, 1990, pp. A-109-110 of Appendix.

lodestar figure.[15] However, it affirmed the attorneys fee award under Ohio's CSPA.

Overlooking the fact that the District Court made no analysis of whether an enhancement multiplier was authorized under CSPA,[16] the Court of Appeals reviewed "the District Court's interpretation of the CSPA fee-shifting provision *de novo*."[17] Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as interpreted by *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941), it then looked for guidance to the most recent decision of the Ohio Supreme Court construing the statute, *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991) (Appendix at A-117). Resisting the urge to infer that the Ohio Supreme Court's past reliance on current federal law interpreting "reasonable attorneys' fee" would cause it to disallow use of an enhancement multiplier under CSPA, the Court of Appeals held that the *Bittner* decision required affirmance of the District Court's award so enhanced.

The Court of Appeals was wrong to follow its own interpretation of the *Bittner* case, rather than to predict how the present case would be decided in the state court system. *See Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943). *Bittner* does not address the issue of fee enhancement directly. It speaks only of *modifying* the lodestar attorney fee figure by examining certain designated factors in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which it cites several times.

The intermediate Ohio courts of appeals have interpreted the *Bittner* decision to evidence a policy of following the principles of

---

[15]Slip Opinion at A-33-34.

[16]Order of August 10, 1990, contains no discussion of this issue.

[17]Slip Opinion at A-35.

U.S. Supreme Court decisions in arriving at attorney fee awards. *Hall v. Lacheta*, 1992 Ohio App. Lexis 5945 at *6 (5th Dist.Ct.App. 1992) (see Appendix at A-146); *Freeman v. Crown City Mining, Inc.*, 1993 Ohio App. Lexis 5062 at *20-*23 (4th Dist.Ct.App. 1993) (see Appendix at A-137-139). In the latter case, the intermediate court of appeals reversed the trial court on the use of a fee enhancement multiplier of 1.5, citing *Bittner* and *City of Burlington* and stating that the factors relied on by the trial court to enhance the fee award were already subsumed in the computation of the lodestar figure. 1993 Ohio App. Lexis 5062 at *23. In the present case, the Court of Appeals likewise ruled that the trial court's factors favoring enhancement under RICO were already reflected in the lodestar figure.[18] However, it somehow read *Bittner* to say that, for purposes of a CSPA fee award, these same factors justified use of a multiplier and that the total fees awarded were not impermissibly high.[19]

The Court of Appeals erred in reading the *Bittner* case as a controlling decision on the use of a fee-enhancing multiplier, a point not even discussed in that case. It further erred in failing to recognize that, to construe the fee-shifting provisions of CSPA, the Ohio Supreme Court would follow U.S. Supreme Court precedents to determine what fee is a reasonable one.[20]

---

[18]Slip Opinion at A-33-34.

[19]*Id.* at A-36.

[20]The Court of Appeals also failed to note that the *Bittner* case limits the award of attorneys fees to the time spent pursuing the CSPA claim. 58 Ohio St.3d at 145. The Court of Appeals failed to apply this limitation and awarded fees for the time spent pursuing all claims below. The result is that the attorney fee award affirmed by the Court of Appeals is far greater than what the District Court would have awarded had it made the award solely on the basis of CSPA.

The effect of the Court of Appeals' holding is to create two systems of justice for Ohio CSPA litigants. In the state court system, successful plaintiffs under the Ohio CSPA cannot recover enhanced attorney fees. *Freeman v. Crown City Mining, Inc., supra.* In the federal system, successful CSPA litigants can ask for and receive attorneys fee awards which are 75% greater, even though no Ohio Supreme Court decision has *ever* authorized such a multiplier.

This case presents to this Court the opportunity to settle an important issue pertaining to the determination of state law by federal courts sitting in diversity cases. In accordance with the holdings of this Court, lower courts should be instructed to determine issues of state law as they believe the highest court of the state would determine such issues, and not necessarily as the outdated dicta of past state court decisions would seem to decide them. By doing so, this Court will put the lower federal courts on equal terms with the lower state courts, searching for answers to state law questions based on what is most reasonable given state and federal precedent in the area, rather than construing existing state law precedent with blinders in place as to analogous federal law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

OF COUNSEL:

Anthony F. Recine, Esq.
1740 Broadway
New York, New York 10019
(212) 708-2200

Respectfully submitted,

STEPHEN L. BLACK
Graydon, Head & Ritchey
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202
(513) 629-2723

Counsel for Petitioner